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No. 94-1105

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In the Supreme Court of the United States

OCTOBER TERM, 1994

STATE OF TEXAS, APPELLANT

v.

UNITED STATES OF AMERICA

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM

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QUESTION PRESENTED

Whether the United States District Court for the District of Columbia correctly issued a preliminary injunction preventing the State of Texas from holding elections for newly-created judgeships which had not been precleared pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

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MOTION TO AFFIRM

Pursuant to Rule 18.6 of the Rules of this Court, the Solicitor General, on behalf of the United States, moves that the judgment of the district court be affirmed.

OPINION BELOW

The opinion of the district court (J.S. App. 1a-3a) is unreported.

JURISDICTION

The judgment of the district court was entered on September 27, 1994. A notice of appeal (J.S. App.

4a-5a) was filed on October 13, 1994, and the appeal was docketed on December 12, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 42 U.S.C. 1973c.

STATEMENT

This case involves an attempt by the State of Texas to hold elections for several newly-created judgeships prior to obtaining preclearance under Section 5 of the Voting Rights Act, 42 U.S.C. 1973c. The State challenges the district court's decision to enjoin those elections.

1. On July 14, 1994, the State of Texas instituted this declaratory judgment action in the United States District Court for the District of Columbia to obtain preclearance under Section 5 for the voting changes in statutes creating new judgeships enacted in 1993 and 1987. (1) Chapter 1032 (1993), which creates the new 385th District Court for Midland County; (2) Chapter 653 (1993), which creates the new County Court at Law No. 3 for Fort Bend County; (3) Chapter 318 (1993), which creates the new County Criminal Court at Law No. 15 for Harris County; and (4) Chapter 38 (1987), which creates four new County Criminal Courts at Law, Nos. 7-10, in Tarrant County. J.S. App. 6a-7a.[1] Judges for those courts were to be elected at large in their respective jurisdictions, for numbered positions, in

[1] The complaint also sought judicial preclearance for the voting changes in Chapter 354 (1993), which replaced Tarrant County Criminal Court No. 5 with a new Tarrant County Criminal Court of Appeals. However, the Attorney General administratively precleared this enactment on August 15, 1994, the same day that the United States filed its answer. See Answer, Exh. E.

partisan elections. Party nominees were to be selected at primaries with majority vote requirements. *Id.* at 8a. At the time the State brought this preclearance action, the three judgeships created by the 1993 statutes had not yet been filled. However, judges were already serving in the four courts created by the 1987 statute. *Id.* at 10a.

Prior to the institution of this action, the State had submitted the voting changes in the three 1993 statutes to the Attorney General for administrative preclearance. J.S. App. 9a-10a. The Attorney General interposed timely objections to each of the proposed changes.[2] The State had also sought administrative preclearance for the voting changes occasioned by the 1987 statute prior to filing the suit but withdrew the administrative submission before the Attorney General made a merits determination.[3] J.S. App. 10a. The State resubmitted those changes the day it instituted this suit, and the Attorney General subsequently interposed a timely objection to them. Answer, Exh. E.

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[2] The Attorney General objected to Chapter 1032 on May 9, 1994, and denied the State's request for reconsideration on July 25, 1994. See Complaint ¶ 13 (J.S. App. 9a-10a); Answer ¶ 13. The Attorney General objected to Chapters 318 and 653 on May 31, 1994. See Complaint ¶ 14 (J.S. App. 10a); Answer ¶ 14.

[3] Texas held elections for the four Tarrant County judgeships, created in 1987, before submitting the change for preclearance. The Attorney General informed the State in October of 1993—more than a year before the 1994 elections—that the changes effected by the creation of those judgeships had not yet been precleared. Letter from Steven H. Rosenbaum to the Hon. John Hannah, Jr., at 1 (Oct. 25, 1993), *reprinted in* Answer, Exh. E.

2. The State has been on notice that implementation of the voting changes occasioned by creation of the judgeships is unlawful "unless and until" they receive administrative or judicial preclearance. 42 U.S.C. 1973c. On several occasions, Texas has assured the courts and the Attorney General that it had no intention of implementing the changes pending preclearance. However, on each occasion the State later sought to implement the unprecleared changes despite its previous assurances.

In 1993, private plaintiffs sued to block the implementation of the Midland County district judgeship created by Chapter 1032 in 1993 pending preclearance. See *Hernandez* v. *Texas*, No. MO-93-CA-178 (W.D. Tex.). The district court dismissed that suit as premature after the State assured the court that it had "no intention to implement the change of creating a new District Court through [Chapter 1032] until such time as preclearance is obtained." Defendant's Motion to Dismiss With Supporting Brief and Original Answer at 1-2, *Hernandez* v. *Texas*, No. MO-93-CA-178 (W.D. Tex.), reprinted as Attachment B to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Despite this assurance, the State sought to implement all the unprecleared judgeships, including the Midland County judgeship, at the March 8, 1994, primary election. Four days before the primary, the Chief of the Voting Section of the Civil Rights Division sent a letter to the Texas Attorney General and Secretary of State reminding them that the State "would violate Section 5 by implementing the * * * changes in the upcoming election." Letter from

Steven H. Rosenbaum to the Hon. John Hannah, Jr., and the Hon. Dan Morales at 2 (Mar. 4, 1994), *reprinted in* Answer, Exh. F. On March 8, the day of the primary election, the Chief of the Voting Section sent via telefacsimile a letter to the Texas Secretary of State reiterating that, under established Section 5 law, "voting changes such as the ones at issue are 'implemented' with the commencement of any part of the election process, including candidate qualification and nomination through primary elections." Letter from Steven H. Rosenbaum to the Hon. John Hannah, Jr. at 1 (Mar. 8, 1994), *reprinted in* Answer, Exh. G.

Despite those warnings, the State proceeded with the primary election on March 8. Two days after the primary, the State assured the Attorney General that it would not engage in any further implementation of the unprecleared judgeships:

> Please be assured that our office intends to comply with Section 5's prohibition on the implementation of the unprecleared voting changes referred to in your letter. Neither the State of Texas nor the county chairs in the affected counties will certify any of the judgeships set forth in Chapters 38, * * *, 318, 653, and 1032 for the November 1994 general election ballot until they are precleared.

Letter from John Hannah, Jr., to Steven H. Rosenbaum at 1 (Mar. 10, 1994), *reprinted in* Answer, Exh. G.

Following the Attorney General's objection to Chapter 1032, which created the new Midland County district judgeship, the private plaintiffs on June 3, 1994, reinstituted their suit for injunctive relief

against the implementation of that provision. In its answer, the State admitted that it had "implemented the electoral aspects of Chapter 1032." Answer ¶ 9, *Hernandez* v. *Texas*, No. MO-94-CA-110 (W.D. Tex.), reprinted as Attachment C to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. On August 22, 1994, after the State had initiated its declaratory judgment action in the District Court for the District of Columbia, an agreed final judgment was entered in the *Hernandez* litigation (to which the United States was not a party). The judgment authorized the State to proceed with the general election for the new Midland County judgeship "regardless of the preclearance status under section 5 of the Voting Rights Act of the legislation creating that office." *Hernandez* v. *Texas*, No. MO-94-CA-110 (W.D. Tex. Aug. 22, 1994), slip op. 1 (three-judge court), reprinted as Attachment A to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. However, it prohibited the State from certifying the winner until Chapter 1032 received preclearance. *Id.* at 2.

3. After the entry of the *Hernandez* judgment, the Texas Secretary of State abandoned his earlier assurance that the unprecleared judgeships would not be certified for the November general election. During proceedings on the declaratory judgment action on August 23, 1994, counsel for the State announced that the Secretary of State intended to certify candidates for *all* of the unprecleared judgeships at issue in the declaratory judgment action—not simply the single Midland County district judgeship at issue in

Hernandez. 8/23/94 Tr. 20-21. Counsel for the United States responded by sending a letter by telefacsimile to the attorney representing the State. The letter requested that the State reaffirm the position the Secretary of State had set forth in his March 10 letter—that Texas would not certify candidates for any of the positions at issue unless and until it obtained preclearance for the creation of those positions. Letter from Robert A. Kengle to Renea Hicks, Esq. (Sept. 7, 1994), reprinted as Attachment E to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction. In a letter dated September 14, 1994, counsel for the State responded that "[t]he state's position now on ballot certification is the same as that stated in open court at the status conference before Judge Jackson on August [23d]." Letter from Renea Hicks to Robert A. Kengle (Sept. 14, 1994), reprinted as Attachment D to United States' Memorandum of Points and Authorities in Support of Application for Temporary Restraining Order and Preliminary Injunction.

Because Texas was about to commence printing ballots for the November election, the United States sought a temporary restraining order and preliminary injunction in the declaratory judgment action pending in the District Court for the District of Columbia. The application, filed on September 14, 1994, requested "an order a) enjoining the State of Texas and its agents, including the responsible county election officials, from taking any steps to certify the names of the candidates nominated in the March 8, 1994 primary election for the November 8, 1994 general election; b) requiring the State of Texas and its

agents, including the responsible county election officials, to withdraw any certification of candidates it has made as a result of the March 8, 1994 primary elections for the seats at issue in this litigation; and c) directing the state to seek dissolution of the *Hernandez* injunction." United States' Application for Temporary Restraining Order and Preliminary Injunction at 2-3.

The following day, a single judge issued a temporary restraining order. On September 27, 1994, the three-judge court held a hearing on the application for a preliminary injunction; it issued its ruling later that same day. J.S. App. 1a-3a. The court granted the application to enjoin the elections for the Fort Bend County, Harris County, and Tarrant County judgeships. J.S. App. 3a. Because the State sought to conduct elections for those judgeships prior to obtaining preclearance, the court concluded that "an injunction to stop the elections [was] mandatory" under this Court's decision in *Clark* v. *Roemer*, 500 U.S. 646 (1991). J.S. App. 2a.[4] However, in deference to the ruling of the three-judge court in *Hernandez*, the court refused to enjoin the election for the Midland County district judgeship or to order the State to seek a dissolution of the *Hernandez* judgment. J.S. App. 2a-3a. The State has appealed the injunction against the Fort Bend County, Harris County, and Tarrant County elections. J.S. App. 4a. The United States did not cross-appeal from the de-

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[4] The United States' motion for a preliminary injunction sought only to enjoin the 1994 election; it did not affect the status of the judges already sitting in Tarrant County. Accordingly, the latter issue is not before the Court. J.S. App. 1a.

nial of relief with respect to the Midland County election.

ARGUMENT

The district court correctly issued an injunction preventing Texas from holding elections for the unprecleared judgeships at issue in this case. This case, which is essentially controlled by *Clark* v. *Roemer*, 500 U.S. 646, 659 (1991), does not present any substantial unresolved issue of law. Accordingly, the Court should summarily affirm the judgment of the district court.[5]

1. Section 5 of the Voting Rights Act of 1965 prohibits certain jurisdictions—including Texas—from implementing changes in "any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting" without first obtaining preclearance from either the United States District Court for the District of Columbia or the Attorney General. 42 U.S.C. 1973c. Where, as here, the Attorney General has interposed an objection to

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[5] We agree with the appellant (J.S. 12) that this case is not moot. By its terms, the injunction affected only the November 8, 1994, general election. However, should Texas attempt to hold elections for the unprecleared judgeships at a later date, "[t]here would be every reason to expect the same parties to generate a similar, future controversy subject to identical time constraints." *Norman* v. *Reed*, 112 S. Ct. 698, 705 (1992). Because the issues presented by this case are "capable of repetition, yet evading review," the district court's "short term order[]" should not defeat their consideration. *Southern Pac. Terminal Co.* v. *ICC*, 219 U.S. 498, 515 (1911). See *Democratic Party* v. *Wisconsin ex rel. LaFollette*, 450 U.S. 107, 115 n.13 (1981) ("[E]ven if the order were clearly limited to the 1980 election year, the controversy would be properly before us as one 'capable of repetition, yet evading review.'"); *Storer* v. *Brown*, 415 U.S. 724, 737 n.8 (1974).

the proposed electoral change, the jurisdiction may not implement the change in any way "unless and until" the District Court for the District of Columbia issues a declaratory judgment "that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or [membership in a language minority group]." *Ibid.* The District Court for the District of Columbia has exclusive jurisdiction to render the necessary declaratory judgment; no other court may consider the substantive question whether the electoral change is entitled to preclearance. See 42 U.S.C. 1973*l*(b); *South Carolina* v. *Katzenbach*, 383 U.S. 301, 334-335 (1966).

Because changes may not be enforced until a covered jurisdiction "has succeeded" in obtaining preclearance, *United States* v. *Board of Supervisors*, 429 U.S. 642, 645 (1977), this Court has held that, at least absent "extreme circumstance[s]," an election for a newly-created position must be enjoined pending a preclearance determination. *Clark* v. *Roemer*, 500 U.S. 646, 654-655 (1991). In enforcing this clear mandate, the District Court for the District of Columbia has consistently granted motions filed by the United States to enjoin elections pending the adjudication of declaratory judgment actions brought by covered jurisdictions. See, *e.g.*, *Lee County, Mississippi* v. *United States*, No. 93-708 (D.D.C. Apr. 26, 1994) (three-judge court); *South Carolina* v. *United States*, 585 F. Supp. 418, 422-425 (D.D.C.) (three-judge court), appeal dismissed, 469 U.S. 875 (1984); *Busbee* v. *Smith*, No. 82-0665 (D.D.C. May 24, 1982) (three-judge court); *Horry County* v. *United States*, 449 F. Supp. 990, 996-997 (D.D.C. 1978) (three-

judge court). Although the full Court has never been presented with challenges to the validity of such injunctions, both then-Chief Justice Burger and then-Justice Rehnquist refused to stay the three-judge court's injunction in *Busbee* v. *Smith*, *supra*. See *Busbee* v. *Smith*, 549 F. Supp. 494, 497 n.1 (D.D.C. 1982) (three-judge court), summarily aff'd, 459 U.S. 1166 (1983).

The District Court for the District of Columbia's practice of enjoining the implementation of electoral changes pending its resolution of judicial preclearance actions is well grounded in the Voting Rights Act. The court's jurisdiction to enter these injunctions stems from two independent sources. First, Section 12 of the Act, 42 U.S.C. 1973j, affords explicit statutory authority.[6] Section 12 authorizes the Attorney General to seek injunctive relief against state actions violative of Section 5, see 42 U.S.C. 1973j(d), and provides that "[t]he district courts of the United States shall have jurisdiction" over such proceedings. 42 U.S.C. 1973j(f). See also *Allen* v. *State Bd. of Elections*, 393 U.S. 544, 554-557 (1969) (private party may sue to enjoin enforcement of state electoral measure that has not received preclearance required

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[6] Citing *South Carolina* v. *United States*, 589 F. Supp. 757, 759 (D.D.C. 1984) (three-judge court), Texas argues (J.S. 9) that the District Court for the District of Columbia has rested its injunctive jurisdiction on Section 14(b) of the Act, which grants that court exclusive jurisdiction "to issue any declaratory judgment" under Section 5. It is clear from the *South Carolina* opinion, however, that the court's citation of Section 14(b) was intended to refer only to the basis for its jurisdiction over the ultimate preclearance determination, not its jurisdiction to issue an injunction. See 589 F. Supp. at 759.

by Section 5). Unlike Sections 5 and 14 of the Act, which provide that only the District Court for the District of Columbia may make the *substantive* determination whether a change is entitled to preclearance, Section 12 contains no geographical limitation. It therefore grants all "district courts of the United States"—including the District Court for the District of Columbia—subject matter jurisdiction to enjoin the implementation of voting changes pending preclearance.[7]

In addition to the authority conferred by Section 12, the District Court for the District of Columbia has jurisdiction to enjoin an election under the established power of courts to issue orders "necessary or appropriate in aid of their respective jurisdictions." 28 U.S.C. 1651(a). Pursuant to that authority, a district court has jurisdiction to maintain the status quo during the pendency of an action where the failure to do so would impair its ultimate ability to afford effective relief. See *FTC* v. *Dean Foods Co.*,

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[7] This is not to say that the District Court for the District of Columbia will always be a proper forum for an injunction against the unlawful implementation of an electoral change. There may, for instance, be cases in which that court lacks jurisdiction over the parties who seek to implement the unprecleared change. Cf. *Charlton County Bd. of Educ.* v. *United States*, 459 F. Supp. 530, 533-535 (D.D.C. 1978). Such cases would be most likely to arise where the covered jurisdiction has not filed an action for judicial preclearance. Here, however, Texas consented to the *in personam* jurisdiction of the District Court for the District of Columbia by filing its complaint for declaratory judgment in that court. In any event, appellant does not contend that the district court lacked jurisdiction *over the parties*; rather, it asserts that the court lacked jurisdiction *over the subject matter*. See J.S. i (first question presented).

384 U.S. 597, 605 (1966); see also *Morrow* v. *District of Columbia*, 417 F.2d 728, 740 (D.C. Cir. 1969) ("[A]ncillary orders will issue when a party's actions, either directly or indirectly, threaten to compromise the effective[ness] of the court's judgment."). If the elections for the unprecleared judgeships had gone forward, the district court would have been significantly compromised in its ability to make a meaningful determination in the State's declaratory judgment action. See *Lucas* v. *Townsend*, 486 U.S. 1301, 1305 (1988) (Kennedy, J., in chambers) ("Permitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect, despite their obvious diligence in seeking an adjudication of their rights prior to the election."). Under such circumstances, an injunction was necessary in aid of the three-judge court's jurisdiction to adjudicate the declaratory judgment action.

Without addressing those well-established bases for jurisdiction, the State claims that the district court had no power to enjoin the elections pending its preclearance determination. It appears to assert that Section 5 actually *prohibits* the District Court for the District of Columbia from enjoining the implementation of unprecleared changes. In the State's view, the United States must institute a separate action in a local district court if it desires an injunction against the illegal implementation of an electoral change, even if the District Court for the District of Columbia is already considering—at the instance of the covered jurisdiction—whether the change is entitled to preclearance. J.S. 8-10.

The State identifies no provision of the Voting Rights Act that requires such a wasteful duplication

of resources. Nor can such a requirement fairly be inferred from this Court's precedents. It is true, as the State notes, that "Congress intended to treat 'coverage' questions differently from 'substantive discrimination' questions." *Allen* v. *State Bd. of Elections*, 393 U.S. at 559. Specifically, Congress reserved to the District Court for the District of Columbia the "difficult substantive issue" of whether a change has a discriminatory purpose or effect, *id.* at 558, while granting jurisdiction to "[t]he district courts of the United States"—without geographic limitation—to enjoin the implementation of covered enactments that have not been precleared. 42 U.S.C. 1973j(f). Congress's intent was clear: to ensure that an expert tribunal would decide the difficult and sensitive matter of whether a state enactment is discriminatory, while allowing individual litigants—who "will often not have sufficient resources to maintain an action easily outside the district"—to obtain injunctions in local district courts against the enforcement of unlawful election practices. *Allen*, 393 U.S. at 559-560. While the "substantive" determination is restricted to a particular court, the "coverage" determination is not.

No case cited by the State—and no case ever decided by this Court—suggests that a local district court is the *only* permissible forum for enjoining covered changes pending preclearance.[8] This Court held

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[8] Relying on *Clark* v. *Roemer*, 500 U.S. at 659-660, the State argues (J.S. 10) that local district courts are in a better position than the District Court for the District of Columbia to decide whether to enjoin the enforcement of unprecleared changes. The cited portion of *Clark* did not involve a choice between a local district court and the District Court for the

in *Allen* that local district courts have jurisdiction to enforce Section 5's prohibition on the implementation of unprecleared voting changes, not that the District Court for the District of Columbia is barred from doing so. See *Allen*, 393 U.S. at 560 ("We hold that the restriction of § 14(b) does not apply to suits brought by private litigants seeking a declaratory judgment that a new state enactment is subject to the approval requirements of § 5, and that these actions may be brought in the local district court."). The district court thus had subject matter jurisdiction to issue the preliminary injunction.

2. The State contends (J.S. 10) that the district court was required to "perform the traditional equitable balancing" before enjoining the election. In particular, the State argues that the district court should have considered whether the State was likely to succeed on the merits of its declaratory judgment action. *Id.* at 11. The State's argument is directly contrary to this Court's decision in *Clark*, and it would subvert the remedial scheme established by Congress in Section 5.

Congress enacted the Voting Rights Act because nearly a century of experience with the Fifteenth

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District of Columbia. Rather, it involved the question of whether the district court or *this Court* was in a better position to fashion a remedial decree. Moreover, the cited portion of *Clark* did not (as the State asserts, see J.S. 10) address a setting "identical to the one giving rise to this appeal." The portion of *Clark* on which the State relies involved the question of what remedy to impose for the elections that the district court had erroneously failed to enjoin. As this Court recognized in *Clark*, entirely different considerations come into play in addressing "the *ex ante* question whether to allow illegal elections to be held at all." 500 U.S. at 654.

Amendment had shown that in some areas of the country, voting rights could not be effectively protected by traditional litigation. "Congress had found that case-by-case litigation was inadequate to combat widespread and persistent discrimination in voting, because of the inordinate amount of time and energy required to overcome the obstructionist tactics invariably encountered in these lawsuits." *South Carolina* v. *Katzenbach*, 383 U.S. at 328. Thus, in an admittedly "uncommon exercise" of its power, *id.* at 334, Congress decided "to shift the advantage of time and inertia from the perpetrators of evil to its victims." *Id.* at 328. That strategy was most clearly reflected in Section 5 which, "without any need for prior adjudication," prevents jurisdictions covered by the Act from enforcing *any* voting change until preclearance has occurred. 383 U.S. at 328. Under that Section, the burden is on the covered jurisdiction to obtain an adjudication that the change lacks discriminatory purpose and effect; voting changes "are not now and will not be effective as laws until and unless cleared." *Connor* v. *Waller*, 421 U.S. 656, 656 (1975) (per curiam).

The State's position would set this carefully crafted scheme on its head. By requiring that a party seeking to enjoin the enforcement of an unprecleared voting change must demonstrate that the covered jurisdiction is unlikely to succeed on the merits of its declaratory judgment action (demonstrate, that is, that the court would likely conclude that the change had a discriminatory purpose or effect), the State's position would reintroduce the "prior adjudication" requirement Congress eschewed in enacting Section 5. In contradiction to this Court's precedents, it would "place the advantages of time and

inertia back on the perpetrators of the discrimination." *United States* v. *Sheffield Bd. of Comm'rs*, 435 U.S. 110, 125 (1978). This Court has therefore repeatedly held that a court considering an application to enjoin the enforcement of an unprecleared voting change may not consider the substantive question whether the change had a discriminatory purpose or effect. Rather, a court may consider only whether the change is subject to Section 5 and whether it has been precleared. See, *e.g.*, *NAACP* v. *Hampton County Election Comm'n*, 470 U.S. 166, 181 (1985); *City of Lockhart* v. *United States*, 460 U.S. 125, 129 n.3 (1983); *Perkins* v. *Matthews*, 400 U.S. 379, 383-386 (1971). The District Court for the District of Columbia has followed this practice. In preliminarily enjoining unprecleared changes, it has correctly refused to consider whether the jurisdictions involved are likely to prevail on the merits of their declaratory judgment actions. See *South Carolina* v. *United States*, 585 F. Supp. at 422-423 n.8.

As the district court in this case recognized, this Court's decision in *Clark* v. *Roemer*, *supra*, is "dispositive" of the State's claim. J.S. App. 1a. There, as here, a State sought to hold elections for newly-created judgeships without obtaining preclearance. Without considering whether the State was likely to succeed in obtaining preclearance for these judgeships, this Court held that, at least absent "extreme circumstance[s]," district courts are "required" to enjoin elections for unprecleared positions. *Clark*, 500 U.S. at 654.[9] Although the Court suggested that

[9] The State suggests that an election for an unprecleared position does not constitute "implementation" of the statute

"[a]n extreme circumstance might be present if a seat's unprecleared status is not drawn to the attention of the State until the eve of the election and there are equitable principles that justify allowing the election to proceed," *id.* at 654-655, this case does not present any such circumstance. The State was on notice of the unprecleared status of the judgeships more than a year before the election, and the Attorney General interposed timely objections. See *id.* at 654. Moreover, "equitable principles" weigh against the State. As detailed above, the State's behavior in this matter has been marked by a cycle of assurances that it had no intention of implementing the unprecleared changes, followed by the implementation of those changes, followed by assurances that it would not implement them any further. The State's attempts to evade the preclearance requirement strongly support the district court's decision to enjoin the elections.

The State relies (see J.S. 11) on *Clark*'s direction to the district court to "adopt a remedy that in all the circumstances of the case implements the mandate of § 5 in the most equitable and practica[l] manner and with least offense to its provisions." 500 U.S. at 660. That directive, however, refers to the framing of an appropriate remedy for elections that had already been held in violation of Section 5. Under such circumstances, the district court must take account of equitable principles in formulating its decree.

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creating that position. See J.S. 11 n.7. However, *Clark* makes clear that the holding of the election—and not merely the swearing in of the victorious candidate—constitutes "implementation" which must be enjoined pending preclearance. 500 U.S. at 652-655.

But "[h]ere the District Court did not face the *ex post* question whether to set aside illegal elections; rather, it faced the *ex ante* question whether to allow illegal elections to be held at all. On these premises, § 5's prohibition against implementation of unprecleared changes required the District Court to enjoin the election." *Id.* at 654.[10] The district court followed this dictate in issuing its injunction.

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[10] The State also relies (see J.S. 11) on the fact that Justice Kennedy, acting as Circuit Justice, weighed equitable factors in deciding whether to enjoin the election in *Lucas* v. *Townsend*, *supra*. That case, however, involved the question whether the contested referendum effected a "change" in voting practices covered by Section 5. See 486 U.S. at 1304. Nothing in Justice Kennedy's opinion calls into question the principle that an electoral practice that is acknowledged to effect such a "change" should be enjoined pending preclearance. Indeed, Justice Kennedy observed that "[p]ermitting the election to go forward would place the burdens of inertia and litigation delay on those whom the statute was intended to protect," and that, "[e]ven if the election is subsequently invalidated, the effect on both the applicants and respondents likely would be most disruptive." *Id.* at 1305.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

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FEBRUARY 1995

☆ U. S. GOVERNMENT PRINTING OFFICE: 1995 387147 20043